Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

FREMONT STREET EXPERIENCE
LIMITED LIABILITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

Where a plaintiff makes a claim alleging ongoing discriminatory conduct in violation of Title III of the Americans with Disabilities Act:

1. Whether the defendant may moot the cause of action by showing that the past instances of defendant's discriminatory conduct (that were identified in the complaint) have been corrected, but without showing that further instances of defendant's conduct will not occur in the future?

2. Whether an affidavit submitted in opposition to a defendant's motion for summary judgment may be disregarded, at the trial court's discretion, because the affidavit describes additional instances of the conduct that was the subject of the complaint, but which specific instances had not occurred until after the date of the complaint and were not described in the complaint?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is the Disabled Rights Action Committee, a Utah nonprofit corporation having members residing in Las Vegas, Nevada. Plaintiff is a member-based organization, and has no stock nor any corporate affiliations. The Disabled Rights Action Committee was one of the Plaintiffs in the District Court, and one of the Appellants in the Ninth Circuit Court of Appeals.

The other Plaintiffs in the District Court, and Appellants in the Ninth Circuit Court of Appeals, were three individual members of the Disabled Rights Action Committee: Carol Lee, Robert Lee, and Ronald Ray Smith.

Respondent

Respondent, Fremont Street Experience Limited Liability Company, ("FSELLC") is a Nevada limited liability company. FSELLC was a Defendant in the District Court, and was the Appellee in the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals also (at times) considered some of the Defendants in the District Court to be Appellees (although they were never named in the appeal, never had any stake in the appeal, and were never involved in the argument of the appeal). The Defendants in the District Court that were at times considered to be Appellees were: Allright Corporation; The Coca-Cola Company; and Race Rock of Las Vegas, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Disabled Rights Action Committee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. A at 1a) is an unreported opinion (available at 44 Fed. Appx. 100, 2002 WL 1677949). The opinion of the district court (App. B at 6a) is an unreported opinion (which is not available in an unofficial reporter).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals that is the subject of this Petition was entered on July 23, 2002. (App. A at 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, each of which is part of Title III of the Americans with Disabilities Act of 1990 ("ADA"):

Section 302(a) of the ADA, which generally proscribes discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to),

or operates a place of public accommodation." 42 U.S.C. § 12182(a).

Section 302(b)(1)(D) of the ADA, which provides (with regard to the construction of Section 302(a)) that "an individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration (i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12182(b)(1)(D),

Section 302(b)(2)(A)(ii) of the ADA, which expressly defines a form of "discrimination," for the purposes of Section 302(a), to include:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.
>
> 42 U.S.C. § 12182(b)(2)(A)(ii).

Section 303(a)(1) of the ADA further defines "discrimination for the purposes of section 302(a)" to include a public accommodation's "failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1).

Section 306(b) of the ADA provides that "the Attorney

General shall issue regulations in an accessible format to carry out the provisions of this title [Title III] not referred to in subsection (a) [("Transportation Provisions")] that include standards applicable to facilities and vehicles covered under section 302." 42 U.S.C. § 12186(b).

This case involves the following regulatory provisions implementing Title III of the ADA. Each of these provisions is found at 28 C.F.R. Part 36, Appendix A (Appendix A contains the "ADA Accessibility Guidelines").

ADA Accessibility Guideline 4.1.1(4) states that the ADAAG's requirements "cover temporary buildings or facilities as well as permanent facilities. Temporary buildings and facilities are not of permanent construction but are extensively used or are essential for public use for a period of time."

ADA Accessibility Guideline 7.2(1) states that "In department stores and miscellaneous retail stores where counters have cash registers and are provided for sales or distribution to the public, at least one of each type shall have a portion of the counter which is a at least 36 in (915 mm) in length with a maximum height of 36 in (915 mm) above the finish floor." No alternate methods of compliance are authorized.

STATEMENT OF THE CASE

In 1995, one of Petitioner's disabled members residing in Las Vegas, Nevada, submitted to the Fremont Street Experience Limited Liability Company ("FSELLC") a written request that FSELLC modify its policies, practices and procedures to ensure that "ready access" would be provided at the temporary and mobile facilities allowed onto "The Fremont Street Experience" (a downtown Las Vegas street

mall over which FSELLC exercises control).

Despite the request, FSELLC continued to permit inaccessible temporary and mobile facilities to locate onto The Fremont Street Experience, and Petitioner (together with several of its disabled members) brought this action in 1998 (a First Amended Complaint was filed in early 2000).

On April 13, 2001, FSELLC moved for summary judgment, asserting that, because the specific instances of inaccessibility identified in the First Amended Complaint had been corrected, there was no genuine issue of material fact remaining for trial. FSELLC did not, however, offer any evidence to show that additional inaccessible temporary or mobile retail sales facilities would not be permitted onto the Fremont Street Experience in the future.

On April 21, 2001, Mr. Ronald Ray Smith (who was a wheelchair user and a member of Petitioner, the Disabled Rights Action Committee) visited The Fremont Street Experience and encountered temporary and mobile retail sales facilities which denied ready access to the disabled (specifically, a mobile grill and two mobile bars had customer service counters that were uniformly in excess of 36 inches in height).

On May 1, 2001, "Plaintiffs' Opposition to FSELLC's Motion for Summary Judgment" was filed and served. Attached to that pleading was the "Third Affidavit of Ronald Ray Smith," wherein Mr. Smith attested to having encountered inaccessible facilities at The Fremont Street Experience on April 21, 2001.

On May 24, 2001, the district court heard oral argument on FSELLC's motion for summary judgment.

On July 23, 2001, the district court's "Memorandum Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motions for Summary Judgment" was entered. App. B at 6a. The district court granted summary judgment to FSELLC on two bases. First, the district court held that disabled persons could not show the requisite "injury in fact" to establish standing to bring a cause of action unless they had been "denied access" to a public accommodation App. B at 22a.[1] Second, the district court held that the correction of the inaccessible conditions, including temporary retail sales facilities, which were specifically identified in the First Amended Complaint rendered the cause of action moot. Accordingly, the additional evidence of FSELLC's alleged violation concerned "new issues" and was not admissible to show that the violation was ongoing. App. B at 19a.

The Disabled Rights Action Committee appealed the district court's decision to the Ninth Circuit. The Disabled Rights Action Committee argued that the district court had applied the wrong standard for "injury" under Title III of the ADA, that the district court had effectively reversed the standard for establishing mootness, and that the district court had improperly excluded timely-filed evidence.

The panel of judges assigned to the case (after briefing but without the benefit of oral argument) initially affirmed the district court in a decision based upon a section of the ADA that had not been cited by any party or by the district court at

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[1] Thus ignoring the ADA's mandate that facilities be "*readily* accessible to and useable by individuals with disabilities," 42 U.S.C. § 12183(a)(1) (emphasis added), and the associated legislative regulations defining "ready access" to customer service counters at retail sales facilities.

any time in the proceedings. On May 30, 2002,[2] the Disabled Rights Action Committee timely petitioned the Ninth Circuit for rehearing and rehearing en banc.

On July 23, 2002, the Ninth Circuit denied the petition for rehearing. Concurrent to that denial of rehearing, the Ninth Circuit panel entered a revised decision (again affirming the district court) which decision is the subject of this Petition.

The Ninth Circuit did not affirm the district court on

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[2] As noted, *infra*, the Ninth Circuit's decision is premised on the assumption that violations of 42 U.S.C. § 12182(b)(2)(A)(ii) (a provision proscribing discriminatory *conduct*) may be treated as a series of discrete violations for the purposes of determining mootness and of determining the admissibility of evidence, a premise which is contrary to this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. ___; 122 S.Ct. 2061 (2002). Significantly, the *Morgan* case was not decided by this Court until June 10, 2002, (a week *after* the petition for rehearing was filed). Petitioner did bring the *Morgan* decision to the attention of the Ninth Circuit (by way of a supplemental citation) to show that a "*series* of violations" is not required to establish a discriminatory "practice," but not to show the applicability of the *Morgan* decision to mootness and admissibility of evidence (the questions presented in this Petition). Where the Ninth Circuit has considered *Morgan* in the context of the admissibility of evidence, it has emphasized that this Court's holding in *Morgan* provides that a statute of limitations does not "bar an employee from using the prior acts as background evidence in support of a timely claim." and has noted that "[i]n the wake of *Morgan*, we must now decide how courts should determine what particular evidence of time-barred acts may be taken into account as 'background' evidence of present, actionable discrimination." *Lyons v. England*, ___ F.3d ___, ___, 2002 WL 31254934, *8 (9th Cir., October 9, 2002). Thus, there is "reason to believe the court below did not fully consider" the recent decision of this Court and a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration and . . . it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Accordingly, "a GVR order is ... potentially appropriate." *Id.*

the basis of the district court's heightened requirement for showing injury under Title III of the ADA. Instead, the Ninth Circuit held that there was "no genuine issue of fact as to whether FSELLC's oversight practices have resulted in violations of the ADA." App. A at 5a. The Ninth Circuit's decision was based upon two determinations.

First, the Ninth Circuit noted that "a lone violation does not establish a pattern or practice on the part of the FSELLC"[3] and that evidence of "ongoing ADA problems at the Fremont Street Experience" was properly excluded from consideration by the district court. With regard to such evidence, the Ninth Circuit held that the district court had discretion to refuse to consider (as "untimely evidence") an affidavit filed and served 23 days prior to the hearing where the affidavit described "new issues" (i.e. evidence of the ongoing violation which had not been "addressed in the First Amended Complaint").

Second, the Ninth Circuit, while describing FSELLC's admission of a permissive policy[4] vis-a-vis "mobile vendors"

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[3] The relevant section of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), refers to discriminatory "*policies*, practices *or* procedures." (emphasis added). Even though a discriminatory *policy* is at issue (in *addition to* a discriminatory practice) and even though that discriminatory policy is the subject of an *admission* (see App. A at 4a-5a), the Ninth Circuit (by application of the standards which are the basis of the Questions Presented in this Petition) has found an absence of a genuine issue of material fact because the record (after application of its evidentiary standards) was "devoid of details on any alleged violations." See App. A at 5a. Accordingly, the requisite *amount* of proof for a policy (or for a practice) is not a subject of this Petition.

[4] FSELLC admitted to maintaining a policy which permits temporary and mobile vendors onto The Fremont Street Experience as long as the vendors merely provide "equivalent service, if the vendor's counters are not compliant with regulations." App. B at 5a. Because the "equivalent

at the Fremont Street Experience, held that "the record is devoid of details on any alleged violations with mobile vendors." Such void, however, was the product of the Ninth Circuit's determination that the district court had properly refused to consider the Third Affidavit of Ronald Ray Smith and, furthermore, on the Ninth Circuit's determination that the unavailability of injunctive relief to remedy a particular instance of FSELLC's permitting inaccessible facilities onto the Fremont Street Experience rendered the prior instance immaterial for the purpose of showing FSELLC's permissive policy. Thus, the Ninth Circuit effectively placed upon the plaintiffs the burden of proving that the violation complained of had *not* been made moot.

While not explicit in its decision, each of the Ninth Circuit's determinations is essentially grounded on the premise that violations of 42 U.S.C. § 12182(b)(2)(A)(ii) (a provision proscribing discriminatory *conduct*) may be treated as a series of discrete violations for the purposes of determining mootness and of determining the admissibility of evidence.

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service" standard is insufficient to afford ready access under the applicable legislative regulations (compare 28 C.F.R. Part 36, Appendix A, ADA Accessibility Guideline 7.2(1) and ADA Accessibility Guideline 7.2(2)), FSELLC's policy continues to violate 42 U.S.C. § 12182(b)(2)(A)(ii).

REASONS FOR GRANTING THE WRIT

I. Regarding The Ninth Circuit's Finding Moot a Claim for Discriminatory Conduct Based on the Mooting of Past Instances of Discrimination.

A. The Decision Below Conflicts with Decisions of this Court.

The Ninth Circuit correctly noted that injunctive relief to correct a prior *instance* of FSELLC's policy of permitting inaccessible mobile retail stores onto the Fremont Street Experience was moot because the mobile retail store had ceased to do business. App. A at 4a. The Ninth Circuit, however, bootstrapped the mootness that is naturally inherent to a court's inability to prevent past *instances* of violative conduct into mootness regarding the underlying *conduct* itself. App. A at 4a.

There is a plain distinction between discrete *instances* of violations of civil rights and the *conduct* (such as policies, practices, or procedures) which *produces* the violations. Very recently, this Court has noted that claims alleging a course of discriminatory conduct "are different in kind from discrete acts. Their very nature involves repeated conduct. . . . Such claims are based on the cumulative affect of individual acts." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. ___, ___, 122 S.Ct. 2061, 2073 (2002) (citations omitted) (discussing hostile environment claims in the context of employment discrimination).[5]

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[5] *See also EEOC v. Waffle House, Inc.*, 534 U.S. 279, ___, 122 S.Ct. 754, 768 n. 3, (2002) (THOMAS, J., dissenting) (in case alleging "unlawful employment *practices*, [the] EEOC's complaint . . . mentioned no instances of discriminatory conduct on the part of Waffle House other than its discharge of Baker.") (emphasis in original).

Section 302(b)(2)(A)(ii) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), proscribes discriminatory *conduct*, and the Ninth Circuit has not held otherwise. The Ninth Circuit has, instead, "bootstrapped" the mooted past *instances* of the discriminatory conduct into a mooting of the challenged conduct itself. The Ninth Circuit's version of the mootness doctrine is plainly at odds with this Court's precedent providing that: "Voluntary cessation of challenged conduct moots a case, however, only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (emphasis in original) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)). If a defendant can escape liability for ongoing conduct (under the doctrine of mootness) based upon the unlikelihood of the recurrence of specific, discrete instances of the conduct, then the burden of proof is effectively reversed as *plaintiffs* will have to show that the conduct will continue.

B. The Question Presented is Important.

In another case involving Section 302(b)(2)(A)(ii) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), this Court emphasized that "one of the [Americans with Disabilities] Act's most impressive strengths has been identified as its comprehensive character." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (internal quotation marks omitted).

On the same day that the Court decided *PGA Tour, Inc. v. Martin, supra*, it also decided *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), which eliminated the use of the "catalyst" theory for awards of attorneys fees in civil rights lawsuits (including suits brought under Title III of the ADA). The Court, mindful of the significance of attorneys fees in

enforcing civil rights laws, considered the possibility of defendants' "unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees," *Id.* at 608, and dispelled that possibility as "only materializ[ing] in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* at 608-09. The Court then stated that "it is not clear how often courts will find a case mooted: 'It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 609 (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and citations omitted).

The Ninth Circuit's decision shows how easily courts may find a case mooted. Under the Ninth Circuit's analysis, when considering mootness, ADA Title III claims regarding a defendant's *conduct* can be literally "disintegrated" into numerous claims regarding each discrete *manifestation* or *instance* of the conduct. Clearly, such an artifice not only diminishes the enforcement of the ADA by providing defendants with a method of avoiding attorneys fees, but it strikes at the very core of enforcement because (as in this case) it permits defendants to simply continue with policies that are in violation of the ADA.

The Ninth Circuit's decision undermines both the 'comprehensive character' of the ADA and the limitation that the mootness doctrine would otherwise place on this Court's decision in *Buckhannon*. Thus, the Ninth Circuit's decision is plainly at odds with the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42

U.S.C. § 12101(b)(1).

II. Regarding The Ninth Circuit's Grant of Discretion to District Courts to Disregard Affidavits in Opposition to Summary Judgment.

A. The Decision Below Conflicts with Decisions of this Court.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), this Court clearly stated that an "untimely" affidavit in opposition to a summary judgment motion is one which is not "served 'prior to the day of the hearing,'" *Id.* at 895 (quoting Fed. R. Civ. P. 56(c)).

Despite the clarity of the Rule 56(c) of the Federal Rules of Civil Procedure,[6] the Ninth Circuit has adopted a novel basis for according discretion to the district court to ignore an affidavit: where an affidavit provides evidence of "new issues" (i.e., instances of a defendant's discriminatory conduct that were not identified in the complaint) showing that the defendant's discriminatory conduct is ongoing, the affidavit will be *deemed* "untimely evidence" (despite the affidavit having been filed many days before the hearing).

As this Court has recently noted, plaintiffs "need not plead a prima facie case of discrimination" in order to survive a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, ___, 122 S.Ct. 992, 999 (2002). The standard adopted by the Ninth Circuit, however, requires a plaintiff opposing

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[6] Apart from the lower courts' decisions in this case, there is an absolute vacuum of precedent in federal case law which would accord a district court discretion to ignore an affidavit in opposition to a motion for summary judgment where the affidavit is submitted prior to the day of the hearing.

summary judgment to have included *even more* in its complaint than a mere prima facie case: the plaintiff must have included in the complaint sufficient *evidence* to present a genuine issue of material fact. In the case of an ongoing violation, of course, the best evidence of a defendant's conduct will always be the most recent evidence, and such evidence is simply not available at the time that a complaint is filed.[7]

In light of *National Railroad Passenger Corp. v. Morgan, supra,* the Ninth Circuit has recently adopted a more expansive approach to the admissibility of *old* evidence (evidence of time-barred acts) of discrimination,[8] so as to conform with *Morgan* and *United Air Lines v. Evans,* 431 U.S. 553 (1977). The Ninth Circuit's decision in this case does not permit a district court to ignore *old* evidence of discrimination. Instead, the Ninth Circuit has permitted the district court to ignore the *most recent* evidence of discrimination. In *United Air Lines v. Evans, supra,* this Court noted that "the critical question is whether any present violation exists." *Id.* at 558. The Ninth Circuit's standard for ignoring the *most recent* (and, perhaps, the *best*) evidence of the violation is plainly contrary to *Evans.*

Finally, as Mr. Ronald Ray Smith (whose affidavit was not considered by the district court) was named as a witness,

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[7] Recently, this Court has stated that "Scant sense supports the single occurrence, prevailing circumstance dichotomy. Why should a prisoner have immediate access to court when a guard assaults him on one occasion, but not when beatings are widespread or routine?" *Porter v. Nussle,* 534 U.S. 516, ___; 122 S.Ct. 983, 991-92 (2002). The sense in the Ninth Circuit's decision is still more scant: how can a disabled person be expected to identify in his complaint more than the specific instances of conduct in violation of the ADA that have already occurred?

[8] See, *Lyons v. England,* ___ F.3d ___, ___, 2002 WL 31254934, *8-9 (9th Cir., October 9, 2002).

the Ninth Circuit's standard is plainly contrary to the concurring opinion[9] of Justice White in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986):

> A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but *he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case.* It is the defendant's task to negate, if he can, the claimed basis for the suit. . . . Petitioner Celotex does not dispute that *if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact.*

Id. at 328 (emphasis added).

The Ninth Circuit affirmed summary judgment for FSELLC because it saw "no genuine issue of fact as to whether FSELLC's oversight practices have resulted in violations of the ADA." App. A at 5a. Not only did the Third Affidavit of Ronald Ray Smith provide such evidence, but Mr. Smith's trial testimony could have provided such evidence. Clearly, the affidavit should have been considered by the district court, and the Ninth Circuit erred in holding that the district court had discretion to ignore the affidavit.

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[9] Because Justice White was the fifth vote, his understanding of the case "would seem to be controlling." *Celotex Corp. v. Catrett*, 477 U.S. at 329 n. 1, (BRENNAN, J., dissenting) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

B. The Question Presented is Important.

This Court has noted that "an essential component of procedural fairness is an opportunity to be heard." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(citing *In re Oliver*, 333 U.S. 257, 273 (1948); and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Under the Ninth Circuit's decision, disabled persons and a disabled rights advocacy organization have been prevented from introducing their best proof of ongoing discrimination. Accordingly, the Ninth Circuit's decision is again at odds with the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

More fundamentally: "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (STEWART, J., concurring). It is a plain affront to fundamental principles of procedural fairness to prohibit a plaintiff, when opposing summary judgment, from entering more evidence than was set forth in the complaint.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed July 23, 2002]

DISABLED RIGHTS ACTION COMMITTEE, et al.,	)	No. 01-16657
Plaintiffs-Appellants, v.	)	D.C. No. CV-98-01514-JLQ
FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, et al.,	)	**MEMORANDUM***
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Nevada
Justin L. Quackenbush, Senior Judge, Presiding

Submitted May 15, 2002**
San Francisco, California

Before: HAWKINS, SILVERMAN, Circuit Judges, and RESTANI, Judge.***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

A group of plaintiffs led by the Disabled Rights Action Committee appeals the grant of summary judgment in favor of the Fremont Street Experience Limited Liability Company ("FSELLC"). The appellants sought to enjoin the FSELLC from violating Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, *et seq.* Because the parties are familiar with the facts, we will not recite them in detail except as necessary. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The appellants contend that the FSELLC violates Title III of the ADA by failing to exercise due care to ensure that the temporary structures at the Fremont Street Experience comply with the ADA. The appellants point to several structures that allegedly violate government regulations as evidence of the FSELLC's poor oversight practices. *See* 42 U.S.C. § 12183(a); 28 C.F.R. Part 36 and Appendix A. Title III of the ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). In the event of a violation of 42 U.S.C. § 12182, the statutory scheme provides for injunctive relief. 42 U.S.C. § 12188; 42 U.S.C. § 2000a-3(a). The district court denied appellants' request for an injunction against the FSELLC, and we review a "summary judgment granting or denying a permanent injunction for abuse of discretion and application of the correct legal principles." *Midgett v. Tri-County Metro. Transp. Dist. of*

Oregon, 254 F.3d 846, 849 (9th Cir. 2001) (citation omitted).

A commercial facility discriminates under 42 U.S.C. § 12182(a) by failing to "design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities . . . ." 42 U.S.C. § 12183(a)(1). It also may discriminate under 42 U.S.C. § 12182(a) by failing to make a reasonable modification in policies, practices, or procedures when such modifications are needed to afford access to individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A)(ii). The appellants alleged that FSELLC engaged in discriminatory patterns and practices by providing inadequate oversight of the Fremont Street Experience, but they failed to come forward with proof sufficient to survive summary judgment. At most, the appellants brought forth evidence of one or two technical violations in the face of numerous instances of compliance. Appellants' evidence cannot be construed to show a discriminatory pattern, practice or policy. The appellants waived all of their other claims on appeal, and thus we conclude that the district court did not abuse its discretion in denying the injunction.

As a preliminary matter, we note that many of the structures challenged by the appellants are accessible only to employees of FSELLC, not to the general public. As a result, the appellants lack standing to assert ADA violations on the YESCO Shed, the parking attendant toll booths, the FSELLC restroom and executive offices, and the temporary stages. *See Long v. Coast Resorts, Inc., 267 F.3d 918, 924 (9th Cir. 2001).* In addition, the appellants explicitly waived any arguments in relation to those issues.

The remainder of the evidence brought forth by the appellants fails to create a genuine issue of fact regarding FSELLC's practices. The appellants do not argue on appeal that the district court erred in concluding that the Coca-Cola kiosk was built in compliance with the ADA regulations, and in any event, the issue is moot because this kiosk has been dismantled for reasons unrelated to the litigation. The

only remaining allegation is that the sales counters at a retail store in the now-defunct Race Rock restaurant violated Rule 7.2(1) of the *ADA Accessibility Guidelines*. Even assuming the Race Rock counter had violated ADA regulations, a lone violation does not establish a pattern or practice on the part of the FSELLC. Instead, an injunction could have been issued to remedy the Race Rock counter, but the issue is moot given that the Race Rock has gone out of business for reasons unrelated to this litigation.

The appellants argue that their concerns are not moot because there have been ongoing ADA problems at the Fremont Street Experience. The appellants contend that the district court erred by refusing to consider the third affidavit submitted by Ronald Smith, which alleged further violations at the Fremont Street Experience. We review the district court's refusal to consider untimely evidence for an abuse of discretion. *See Carpenter v. Universal Star Shipping, S.A., 924 F.2d 1539, 1547 (9th Cir. 1991).* We agree with the district court that the claims in the affidavit raise new issues that were not addressed in the First Amended Complaint, and thus the district court did not abuse its discretion in refusing to consider the affidavit.

The appellants point out that Mark Paris, President and Chief Executive Officer of FSELLC, stated that the company occasionally allows mobile vendors for special events at the Fremont Street Experience. Paris's declaration explains that the company's policy and practice is to instruct vendors to make accommodations, such as setting up a table next to the mobile facility to provide equivalent service, if the vendor's counters are not compliant with regulations. Because the record is devoid of details on any alleged violations with mobile vendors, however, we conclude that there is no genuine issue of fact as to whether FSELLC's oversight practices have resulted in violations of the ADA. In fact, the record reveals that FSELLC took seriously its obligations under the ADA and voluntarily remedied many

of the conditions complained of, whether they were required to or not.

In sum, the appellants have simply failed to bring forth evidence of a series of ADA violations at the Fremont Street Experience that would create a genuine issue as to whether the FSELLC's oversight practices could be construed as a violation of the ADA. Accordingly, the district court did not abuse its discretion in refusing to issue an injunction against the FSELLC.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Entered and Served July 23, 2001]

DISABLED RIGHTS ACTION COMMITTEE, RONALD RAY SMITH, CAROL LEE, and ROBERT LEE	)
Plaintiffs,	) NO. CV-98-1514
vs.	)
FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, RACE ROCK OF LAS VEGAS, LLC, ALLRIGHT SIERRA PARKING INC., and ALLRIGHT CORPORATION,	) MEMORANDUM) OPINION AND) ORDER DENYING) PLAINTIFFS') MOTION FOR) SUMMARY) JUDGMENT AND) GRANTING) DEFENDANTS') MOTIONS FOR
Defendants.	) SUMMARY) JUDGMENT

Before the Court are Defendant Fremont Street Experience Limited Liability Company's Motion for Summary Judgment; Third-Party Defendant Coca Cola Company, Inc.'s Motion for Summary Judgment; and

Plaintiffs' Cross-Motion for Summary Judgment, heard on May 24, 2001, in Las Vegas, Nevada. Richard Armknecht appeared on behalf of Plaintiffs Disabled Rights Action Committee (DRAC) and Ronald Ray Smith, Carol and Robert Lee. Patrick J.R. Reilly appeared on behalf of Defendant Fremont Street Experience Limited Liability Company (FSELLC). Danielle Jacoboni appeared on behalf of Third-Party Defendant Coca Cola Company, Inc. (Coca Cola). Having reviewed the record, heard argument of counsel, and being fully advised in this matter, It Is Hereby Ordered that FSELLC's Motion for Summary Judgment is Granted; Coca Cola's Motion for Summary Judgment is Granted; and Plaintiffs' Cross-Motion for Partial Summary Judgment is Denied for the following reasons.

1. Factual and Procedural Background

Plaintiffs brought this action claiming that FSELLC has violated the Americans With Disabilities Act (ADA), 42 U.S.C. § 12182(a) and the applicable regulations including architectural standards for accessible design of public accommodations, as well as violating Nevada State's version of the ADA. Plaintiffs seek injunctive relief and damages for unjust enrichment under the ADA and compensatory damages under Nevada State law.

Plaintiffs now seek summary judgment as to the Defendant's liability. FSELLC and Coca Cola both contend they are entitled to summary judgment because all of the accessibility issues have been resolved and that Plaintiffs are not entitled to either prospective injunctive relief or damages. The court is satisfied Plaintiffs' position is without merit and that Defendants are entitled to summary judgment.

Plaintiffs DRAC and Ronald Ray Smith filed their original Complaint against FSELLC alleging that FSELLC had constructed a Coca-Cola vending kiosk at the Fremont Street Experience with a counter built too high off the ground for wheelchair users. FSELLC subsequently added

Coca Cola as a Third Party Defendant. It was also alleged that FSELLC occasionally erected temporary performance stages within the Fremont Street Experience that did not provide access to wheelchair-bound persons. Plaintiffs then filed an Amended Complaint adding Carol and Robert Lee as Plaintiff and adding Race Rock of Las Vegas, Inc., Race Rock of Las Vegas, L.L.C., Allright Sierra Parking Inc., and Allright Corporation as Defendants. The Plaintiffs alleged, inter alia, that a series of three parking attendant toll booth at a parking garage owned by the Fremont Street Experience and operated by Allright Sierra did not have ramps for wheelchairs which violated the ADA. The Plaintiffs further alleged that Race Rock, a restaurant still under construction at the Fremont Street Experience, and not yet open to the public at the time, violated the ADA. It was further alleged that a work shed (the Red Shed) operated by Young Electric Sign Company (YESCO) at the Fremont Street Experience violated the ADA. The Plaintiffs also added a claim of "unjust enrichment" against FSELLC, claiming that they were entitled to recover the full amount of economic gain realized by FSELLC during the time of the alleged illegal conduct.

Plaintiffs' Amended Complaint alleges that temporary performance stages, an employee work shed, and parking garage toll booths within the Fremont Street Experience violate the architectural guidelines for newly constructed places of public accommodation found in ADA regulations. To begin with, the court finds it unlikely that performance stages, employee work areas, and parking garage toll booths are places of "public accommodation." However, assuming that they meet the definition of public accommodation, there is a complete failure of any evidence in this record of an injury in fact. The record reflects, that Plaintiff Smith makes tours of the Fremont Street Experience and identifies what he believes to be ADA violations. There is nothing whatsoever in the record to establish an injury in

fact to any individual Plaintiff or any DRAC member. There is no evidence that anyone was ever denied access to a public area by reason of a failure to abide with the ADA.

The court is concerned that no party in this case has complied with Fed. R. Civ. P. 56 by filing a statement of undisputed facts or statement of disputed facts. However, Plaintiffs' have utterly failed to establish that they were denied accessibility to a temporary stage, employee work area or parking garage toll booth, much less that they were injured thereby. There is no showing in the record that anyone was denied employment by FSELLC or that anyone ever needed access to the YESCO work shed or the parking toll booths. Plaintiffs merely state . . . that they 'observed' certain conditions existing at the Fremont Street Experience on a given date. There is no contention that any of the Plaintiffs are or tried to be or desire to be entertainers denied access to a performance stage, or employees entitled to access the work shed, or employees working in the parking garage, who were denied access to the toll booths.

When the court directed Plaintiffs to state with particularity what formed the basis of Plaintiffs equitable and monetary damage claims, Plaintiffs only stated that inaccessible temporary stages set up on the property from time to time, inaccessible mobile retail sales facilities entering on the property from time to time, and inaccessible parking attendant kiosks formed the basis for their claims. The alleged violations noted by the Plaintiffs in these regards have all been remedied. FSELLC purchased lifts to be used with temporary performance stages, installed a ramp to the "Red Shed" designed by the Plaintiffs and ordered ramps, approved by the Plaintiffs, to be added to the remaining two toll booths. The only retail facilities identified by the Plaintiffs were the Coca-Cola kiosk and the Race Rock Restaurant under construction at the time. Both the Coca-Cola kiosk and the Race Rock Restaurant have been dismantled, for reasons unrelated to this litigation.

Additionally, the evidence establishes that the Coca Cola kiosk as designed and built did meet the ADA architectural requirements in that a portion of its counter was wheel chair accessible. A portion of the counter was no higher than 36 inches as required, and there was also a roll-out counter a maximum of 3 feet above finished grade. Correspondence between the City of Las Vegas and Coca-Cola establishes that all parties involved in the construction of the Coca-Cola kiosk were intent on meeting all ADA requirements while constructing the Coca-Cola kiosk. Plaintiffs suggestion that the plans may not have been followed in building the kiosk is without any factual support whatsoever. The court is satisfied that the Coca-Cola kiosk was built as designed and that it has been dismantled for reasons unrelated to this litigation. Therefore, any claim that the Coca-Cola kiosk did not comply with ADA regulations is moot, and it is clear that Coca Cola is entitled to summary judgment as to any claim against Coca Cola. Accordingly, Coca Cola's Motion for Summary Judgment is Hereby Granted.

As a result of this lawsuit, FSELLC unilaterally agreed to do the following: (1) lower a urinal in the Fremont Street executive offices by four inches; (2) lower an after-hours security buzzer at the Fremont Street offices; (3) instruct YESCO to modify its storage "red shed" by replacing the door handle and including a ramp leading to the entrance; (4) move two parking spaces identifying Fremont Street's Employee of the Month and Employee of the Year to another location, so that the parking spaces formerly identified for their use, could be re-labeled as handicapped parking spaces, and (5) instructed Race Rock to address inaccessibility issues raised by the Plaintiffs with respect to the Race Rock Restaurant being constructed.

Plaintiffs then dismissed all claims against Race Rock, which ceased operations on April 9, 2001. Accordingly, any claim by the Plaintiffs that the Race Rock

Restaurant is not ADA compliant is also moot. Plaintiffs never served Allright Sierra parking and Allright Corporation, who were then dismissed by the court. YESCO was also dismissed as a Third party Defendant by stipulation of the Plaintiffs. Therefore, the only remaining Defendant is FSELLC.

FSELLC used one of the Plaintiffs' engineers to design the ramp leading to the YESCO Red Shed, and also got Plaintiffs to approve the ramps leading to the three parking toll booths. Additionally, FSELLC purchased two wheelchair lift to be used at the Fremont Street Experience whenever a temporary stage was utilized.

On November 3, 2000, this court entered an Order re Pending Motions and Scheduling Order (Ct. Rec. 100). In that Order, the court directed Plaintiffs to file a final definitive statement re ADA violations and a definitive statement specifying with particularity what claims they are alleging as a basis for the requested equitable relief.

On November 16, 2000 (Ct. Rec. 104) Plaintiffs filed a "Statement of Claims as a Basis for Equitable Relief" stating that the existing physical violations of the ADA are as follows:

> A. Inaccessible temporary stages in violation of AGAAG 4.1.1(3) set up on the property from time to time.
>
> B. Inaccessible mobile retail sales facilities in violation of ADAAG 7.2(1) entering the property from time to time.
>
> C. Inaccessible parking attendant kiosks in violation of ADAAG 4.1.1(3).

The report then states:

> Inadequate oversight by Fremont Street Limited Liability Company of structures erected on or brought onto its property. The root cause of all of the discriminatory conditions complained of is a failure of the owner of the Fremont Street Experience

to exercise due care that Title III of the ADA is not violated on its property.

The statement concludes with the statement that the "inadequate oversight by FSELLC . . . provides the basis for equitable relief in the form of an accounting for profits to require FSELLC to disgorge to Plaintiffs its unjust enrichment by its failure to hire qualified ADA consultants to ensure that FSELLC meets the requirements of Title III of the ADA so that the federal civil rights of disabled persons living in or visiting Las Vegas would not be abrogated."

Clearly this statement is not at all definitive or specific and does not comply with the November 3, 2000 Order of this court.

2. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975). The moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there is no genuine issue of material fact in dispute. Fed. R. Civ. P. 56(c); *Semegen v. Weidner*, 711 F.2d 141 (9th Cir. 1983).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Where the moving party has met its initial burden with a properly supported motion, the party opposing the motion "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but . . . he must set forth specific facts showing

that there is a genuine issue for trial." *Anderson, supra* at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* A party opposing summary judgment must "do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 586.

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes which are irrelevant or unnecessary to the outcome are not counted. *Anderson, supra* at 248. Where there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex, supra* at 323.

Affidavits that do not demonstrate personal knowledge are insufficient to defeat summary judgment. *Commodity Futures Trading Commission v. Save,* 611 F.2d 270, 282 (1979). Likewise, "legal memoranda and oral argument are not evidence and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979).

3. The Americans With Disabilities Act

Plaintiffs concede that money damages are not available under the federal ADA, but claim that they are entitled to injunctive relief and unjust enrichment under the federal ADA, as well as money damages under Nevada law, which does have a provision for money damages to injured plaintiffs.

A. Standing

Defendants argue that the Plaintiffs do not have standing to pursue their claims. The Plaintiffs are similarly situated individuals with disabilities who allege that they have been denied equal access to and usability of the facilities of the Defendants in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* – specifically Title III of that Act. Therefore, the court is satisfied that Plaintiffs do have standing for their claims under the ADA. However, I find that the Defendants are entitled to summary judgment, because there is a complete failure by the Plaintiffs to provide any evidence of injury in fact in the record, which is an essential element of Plaintiffs' case.

B. The Federal ADA

Plaintiffs' complaint invokes Title III of the ADA, which establishes a prohibition against discrimination by public accommodations. Title III provides in relevant part, that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of anyplace of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

The ADA mandates that places of public accommodation and commercial facilities shall be accessible to persons with disabilities. For commercial facilities and places of public accommodation, this mandate is encompassed within Title III of the ADA, 42 U.S.C. § § 12181, *et seq.* Title III's provisions are implemented through regulations promulgated by the Department of Justice which include guidelines for new construction and alterations. *See* 42 U.S.C. § 12186(a); 28 C.F.R. Part 36 and

Appendix A. These guidelines are called the Americans with Disabilities Act Access Guidelines specifically designed for application to newly constructed and altered facilities.

Plaintiffs concede that the Title III of the federal ADA provides only for preventive and injunctive relief, but argue that disgorging FSELLC of all profits is preventive and is therefore available under the federal ADA. I disagree.

(1) Unjust Enrichment

Under Title III of the ADA, which deals with public accommodations and services operated by private entities, 42 U.S.C. § 12188(a)(1) states:

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provide to any person who is being subjected to discrimination in the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title.

42 U.S.C. § 2000a-3(a) allows aggrieved persons in a civil action to seek . . .

> preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, [which] may, in its discretion permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance.

The unjust enrichment relief sought by the Plaintiffs is a form of monetary relief, not available to individuals under Title III of the ADA. In creating a cause of action for private individuals, Congress limited the remedies available under that cause of action to preventive or equitable relief. *Fischer v. SJB-BD. Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000).

Monetary relief is not an option for private individuals under Title III of the ADA. Therefore, at most, a Plaintiff who filed a Title III ADA claim can hope to improve access through an for injunction and nothing more. *Id.*

(2) Injunctive Relief

In order to obtain injunctive relief, Plaintiffs must establish (1) they suffered an injury in fact; (2) the injury is fairy traceable to the challenged action of the Defendant; and (3) it is likely as opposed to speculative, that the injury will be redressed by a favorable decision. *See Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000). "An injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 1131.

There is a complete lack of a showing of injury in fact in this case. There is no allegation that any Plaintiff was ever employed or sought employment as an entertainer with the Fremont Street Experience, which would entitle them to access a temporary performance stage, or that any Plaintiff was denied access to a temporary retail structure, or access to the employee work area "Red Shed" or was ever denied access to a parking toll booth. Plaintiffs have not established the invasion of a legally protected interest which is concrete and particularized and actual or imminent.

(a) Temporary Stages

Occasionally temporary performance stages are erected at the Fremont Street Experience for special events. However, FSELLC has always had a policy of not allowing the public to access these temporary stages. While public access to temporary stages is contractually prohibited, FSELLC has nevertheless purchased two wheelchair lifts for access to temporary stages, should it become necessary. Only performers and their staffs are allowed access to a temporary stage. None of the Plaintiffs have ever been employed as or by a performer at a Fremont Street

Experience event. Plaintiff Smith claims his dignity was affronted when he recently observed a pickup bed being used as a temporary stage, without use of a wheelchair lift, that was only large enough to accommodate the one nondisabled entertainer. Clearly this does not satisfy the requirement the invasion of a concrete and particularized actual or imminent legally protected interest to establish an injury in fact fairly traceable to the challenged action of the Defendant.

(b) Temporary Mobile Retail Structures.

In this category, Plaintiffs alleged that the Race Rock Restaurant violated the ADA, a claim that has now been dismissed. Plaintiffs further alleged that the Coca-Cola kiosk violated the ADA because its counter exceed the ADA height requirement. However, as discussed *supra*, the Coca Cola kiosk as designed and built did meet all ADA requirements and has now been dismantled as has the Race Rock Restaurant.

(c) Parking Attendant Toll Booths

The Fremont Street parking garage contains a row of three parking attendant toll booths, through which automobiles exit upon leaving the garage. At the time this Complaint was filed, only one of the three had a wheelchair ramp leading to the booth. The parking garage is managed by Allright Sierra Parking, Inc., which has now been dismissed as a Defendant. None of the Plaintiffs are employed or have ever applied for employment as a parking attendant with Allright Sierra Parking. Nevertheless, FSELLC has voluntarily agreed to and is in the process of installing ramps leading the two remaining toll booths, the design of which the Plaintiffs have approved.

(d) The YESCO Red Shed

The Red Shed is an employee work shed for employees of Young Electric Sign Co., who has now been dismissed as a Defendant. Once again, there is no evidence that any Plaintiff was ever employed by or applied for work

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with YESCO, which would entitle them to access to the Red Shed. Nevertheless, FSELLC has had a ramp designed by the Plaintiffs built leading to the Red Shed. Mr. Smith now claims that the ramp does not have a level landing at the top, ignoring the fact that the Red Shed ramp was designed by the Plaintiffs.

Therefore, every alleged violation of the ADA alleged in Plaintiffs' Original and Amended Complaint has been remedied, whether or not it was required under the ADA.

Plaintiffs now try to assert new claims by way of an affidavit of Plaintiff Smith filed on May 1, 2001, stating newly observed problems at the Fremont Street Experience. This affidavit raises completely new issues. The court is satisfied that it is not going to order prospective injunctive relief based on these newly raised issues. Even as to these newly observed problems, there has been no showing of injury in fact. If Plaintiffs feel that they can establish that they have suffered an injury in fact by way of the newly raised problems, and are unable to get relief from FSELLC or whoever is responsible, these new issues could form the basis of a new case seeking preliminary injunctive relief.

Plaintiffs' citation to *Concerned Parents to Save Dreher Park Ctr.*, 884 F.Supp. 487 (S.D. Fla. 1994) is misguided. In that case, an association of disabled persons and individual disabled persons sued a city alleging that the city's proposed budget cuts would eliminate recreational programs for disabled persons in violation of the ADA. The court found that the individual plaintiffs were entitled to a permanent injunction requiring the city to continue to effectuate a plan to establish special recreations programs for the plaintiffs because the plaintiffs were participants in the program for persons with disabilities that was eliminated by the budget cuts.

The 12 named plaintiffs were participants in the City's Special Populations Program for persons with

disabilities at Dreher Park . . . .

> Each of the plaintiffs benefitted from the program for individuals with disabilities available at the Dreher Park Center.
>
> In September of 1993 the City eliminated the Dreher Park Center program during budget cuts provoked by a shortfall in revenue. At that time, there was no program in place that was suitable to provide any recreational services to the 12 plaintiffs, who were qualified individuals with disabilities who sought to enjoy the benefit of the City's leisure services program. Coupled with the City's complete elimination of the program for persons with disabilities was an extreme disparity between the extent of the budget cuts for the disabled population and the nondisabled. The combination of these factors constituted a violation of Title II because the city had effectively denied plaintiffs the benefit of the leisure services on account of their disabilities.

Id. at 488-489.

Thus, the plaintiffs had clearly established an injury in fact. The court was careful to note that the plaintiff were only entitled to an injunction requiring the City to continue to effectuate its plan to establish a special recreational program that will be available to the plaintiffs on an equal basis with the nondisabled. The court found that the plaintiffs had no standing to seek a permanent injunction obligating the court to oversee the City's completion of its self-evaluation and transition plans.

To the contrary here, no Plaintiff has been denied the opportunity to benefit from enjoyment of the Fremont Street Experience on account of their disabilities. Excluding plaintiffs from access to temporary performance stages, employee work areas, and parking toll booths has no more impact on the disabled than on nondisabled members of the general public, who are also denied access to temporary

performance stages, employee work areas, and parking toll booths.

In *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000), the court found that environmental organizations had shown "injury in fact" because members had testified they had derived recreational and aesthetic benefit from use of a bay and that their use had been curtailed because of their concern about pollution and contaminated fish. The court found that the injury was fairly traceable to the defendant's conduct because the plaintiffs had shown that the defendant had discharged a pollutant that caused or contributed to the kind of injuries alleged.

Here, there is no allegation that members of the Disabled Rights Association or any individual Plaintiff ever derived any benefit from the temporary stages, Coca-Cola kiosk, Red Shed, or parking toll booths at the Fremont Street Experience or that their use of the Fremont Street Experience has been curtailed in any way by their inability to access temporary stages, temporary retail kiosks, employee work areas, or parking toll booths.

Plaintiffs cite *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000) in support of their injunctive argument. In that case, disabled persons sued the owner of an office building, seeking an injunction to compel the owner to bring the building into compliance with the ADA. The court found that none of the plaintiffs had established an injury in fact except for one blind plaintiff who had attempted unsuccessfully to access a restroom in a restaurant within the building because the restroom's sign was not ADA compliant. The court stated that to demonstrate injury in fact, a plaintiff must show that he or she sustained or is in danger of sustaining some direct injury as the result of the challenged conduct and that the injury or threat of injury is both real and immediate, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). (Emphasis added).

> Although plaintiffs need not engage in the 'futile gesture' of visiting a building containing known barriers that the owner has no intention of remedying . . . they must at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 . . . .

Id. at 892. (Emphasis added).

Plaintiffs here have knowledge of what they perceive to be ADA violations at the Fremont Street Experience. However, there is no claim here that any of the Plaintiffs have ever been employed or sought to be employed by FSELLC, where they encountered barriers to a temporary stage, or employee work area or that any Plaintiff was unable to exit the parking garage due to the lack of ramps at two of three parking attendant toll booths, or that any Plaintiff was denied access to a retail kiosk that they desired to use, or that they would do so in the future but for the ADA violations.

In all of the cases cited by the Plaintiffs there was clear evidence of an injury in fact. There clearly is no claim here that any of the individual Plaintiffs, nor any member of DRAC has in any way been injured by any of the claimed violations of the ADA. Plaintiffs claims are simply that they have witnessed temporary stages, temporary retail facilities, employee work areas, and parking toll booths that do not meet the building specifications of the ADA regulations. There is no allegation that any Plaintiff has suffered any concrete or direct injury as a result of these alleged violations.

The Plaintiffs in this case seek injunctive relief by having this court order (1) FSELLC to hire someone to conduct a thorough ADA Title III review of all structures built at the Fremont Street Experience or temporarily located to the Fremont Street Experience; and or (2)

monetary civil contempt sanctions for any new violations, without citing any authority for either request. Yet, Plaintiffs argue that FSELLC cannot delegate its responsibilities to ensure ADA compliance to anyone they might hire.

In *Dreher Park, supra*, the plaintiffs sought a permanent injunction imposing extensive, finely detailed requirements on the City and to require the City to consult with the plaintiffs about every aspect of the leisure services operations.

> The Court declines the plaintiffs' invitation to place the City's leisure services department permanently under the joint supervision of the Court and the plaintiffs in this action. The Court finds that the plaintiffs have failed to establish any justification for the Court to substitute its judgment for that of the city administration as to how to comply with the ADA, or for the court to oversee the City's efforts to comply.

Id. at 489-490.

Here, too, the court sees no justification for this court to substitute its judgment for that of the FSELLC as to how to comply with the ADA or for this court to oversee FSELLC's efforts to so comply. There is nothing in the record to be the basis for this court becoming the monitor for FSELLC compliance with the ADA. FSELLC has voluntarily remedied every ADA violation alleged by the Plaintiffs, whether or not it was actually a violation. I therefore must conclude that the Plaintiffs are not entitled to injunctive relief under the federal ADA.

C. The Nevada ADA

Plaintiffs also seek compensatory damages under the Nevada ADA. In a very similar case also brought by DRAC and Plaintiff Smith alleging structural violations of the ADA and Nevada State law, which Plaintiffs had observed at the Orleans Hotel and Casino, Magistrate Judge then, now

District Court Judge Hunt found that the Nevada ADA provision for damages was intended for cases of discrimination directed toward specific individuals and is not intended to provide a right to recover monetary damages for deficiencies in the design of a structure. *Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203 (D. Nev. 1999). Judge Hunt noted that the Nevada Supreme Court has not ruled on this issue, but in a very well reasoned opinion found it unnecessary to try to divine what Nevada's courts will do.

Judge Hunt found that the plaintiffs had failed to show they had suffered any injury, or that Defendants' actions were the proximate cause of the injury, or that Defendants' actions were in violation of any duty owed to the Plaintiffs which could entitle them to monetary damages. *Id.* at 1210.

> Liability may not be found in a vacuum. Plaintiffs must show they suffered an injury that Defendant's actions were the proximate cause of the injury and that Defendant's actions were in violation of a duty owed to the Plaintiffs. It is clear that Defendants had and have a duty to construct and maintain facilities that comply with the ADA and the Nevada ADA, and that for a time, at least with respect to those items which existed but were corrected, there was a violation of that duty. However, the mere violation of a law or regulation does not establish injury any more than it is enough to compel the issuance of an injunction.
>
> . . .
>
> Plaintiffs are obligated to show, by competent evidence, that Defendants' actions caused injury to them. Otherwise, any disabled person situated anywhere in the world, could make a claim for damages against the Defendants. It is the denial of accessibility to Plaintiffs which is at issue.

> Plaintiffs' motion utterly fails to establish that they were denied accessibility, much less that they were injured thereby. They merely state . . . that they 'observed' certain conditions existing at the Orleans on a given date. They do not show that they were guests, or attempted to be, or even desired to be, guests of the Orleans. They do not show that they were forced to seek accommodations elsewhere or even suggest that they were injured, monetarily, physically, or emotionally, by the conditions which they saw.
>
> Plaintiffs have the burden of proving that they suffered injury by reason of the Orleans' actions and that there is a reasonable probability of the existence of a causal connection between the Orleans' actions and some damage to them. This element of proof is called the fact of damage and is a predicate to finding liability. Only then can the Court permit a finding of the amount of damages.

Id. at 1210

Plaintiffs argue that this court is not bound by *dicta* in *Long* that the Nevada ADA is not intended to provide a right to recover damages for deficiencies in the design of a structure. While this court is not bound by *Long*, I find the reasoning of Judge Hunt in that case to be very well reasoned and sound.

Plaintiffs rely heavily on the case of *Independent Living Resources v. Oregon Arena Corp.* 982 F.Supp. 698 (D. Or. 1997). In that case, a disabled attorney and a nonprofit advocacy organization for the disabled brought action against the owner and operator of the Rose Garden in Portland, Oregon alleging that the arena as constructed violated both the federal ADA and the Oregon counterpart. The Plaintiffs in that case had attempted to purchase tickets and were told that there were no wheelchair tickets available, while their ambulatory friends were able to

purchase conventional seats. Therefore, the plaintiffs had clearly set forth facts to establish injury in fact.

The court noted that as a general rule, "the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons, to the extent feasible given the limitations imposed by that person's disability." The court noted that the ADA "does not require a public accommodation to fundamentally alter the nature of the goods or services being provided."

Here it is clear that no patrons of the Fremont Street Experience have access to the temporary performing stages, employee work areas, or parking garage toll booths.

The Oregon court also found that damages were not available under the Oregon ADA, just as Judge Hunt found concerning the Nevada ADA.

> Here, plaintiffs have alleged hundreds, if not thousands, of individual violations including, *inter alia*, the placement of the ketchup, feminine hygiene products, and toilet paper dispensers; the design of the drinking fountains, the Trail Blazer's locker room and the handrails on the walkways; and the length of the telephone cords. However, the record does not show that plaintiffs personally attempted to obtain ketchup and were unable to do so, or were unable to use a drinking fountain or toilet paper dispenser or to make a telephone call, or were injured by a faulty handrail. Nor does the record show that plaintiffs personally were injured by the alleged violations in the design of the Trail Blazer's locker room, or that plaintiffs have ever been in that locker room in any capacity other than as parties to this lawsuit.
>
> I also question whether ORS 659.425(4) applies to passive conduct, e.g., the failure to retrofit a building to be wheelchair accessible, or to install a

> wheelchair ramp, or to install wheelchair lifts on buses. Rather, the language of the statute is unlawful to make any distinction, discrimination or restriction because a customer or patron is a disabled person' suggests active conduct of some sort, especially conduct that is targeted to a specific individual.
>
> . . .
>
> I conclude that ORS 659.425(4) was not intended to provide a right to recover damages for deficiencies in the design of a structure.

Id. at 773.

Plaintiffs have set forth no facts to even suggest that they were injured, monetarily, physically, or emotionally, by the conditions which they saw at the Fremont Street Experience.

Plaintiffs argue that monetary damages for intangible injuries to an individual are proper under Nevada law, relying on Plaintiff Ronald Ray Smith's affidavit stating that he "sustained considerable affront and indignity" due to ongoing discrimination at the Fremont Street experience, including inaccessible work areas as being analogous to a "No Disabled Persons Need Apply" sign. The court cannot agree.

N.R.S. § 651.070 provides that all persons are entitled to equal enjoyment of places of public accommodation, without discrimination or segregation on the ground of disability. N.R.S. § 651.090 provides that any person who withholds, denies, deprives, or attempts to withhold, deny or deprive any other person of any right or privilege as secured by N.R.S. § 641.070 is liable for damages. This court agrees with Judge Hunt that liability under the Nevada ADA cannot be found in a vacuum. Rather, the language of the Nevada statute refers to actions by persons and appears to be directed toward personal activities which deny or deprive disabled persons of their rights, where personal

conduct, rather than structural defects, are the source of the discrimination.

As was the case in *Long v. Coast Resorts, supra*, 32 F.Supp.2d 1203, Plaintiffs are obligated to show, by competent evidence, that Defendants' actions caused injury to them. Otherwise any disabled person situated anywhere in the world, could make a claim for damages against the Defendants. It is the denial of accessibility to Plaintiffs which is at issue. Plaintiffs have made no such showing. Therefore, I find that Plaintiffs are not entitled to recover money damages under the Nevada ADA.

4. Conclusion

For the foregoing reasons, this court can only conclude that the Plaintiffs have failed to establish an essential element of their case. There is simply no evidence that any Plaintiff has suffered an injury in fact as to any of the alleged violations of either the federal ADA or of the Nevada ADA. Therefore, Plaintiffs have not established that the are entitled to any injunctive relief or unjust enrichment under the federal ADA or any right to recover compensatory damages under the Nevada version of the ADA. Even construing all facts and inferences arising therefrom in the light most favorable to the Plaintiffs, the court must conclude that Plaintiffs have not set forth disputed material facts, sufficient to avoid summary judgment, nor undisputed facts sufficient to entitle Plaintiffs to summary judgment. Accordingly, Plaintiffs' Motion for Summary Judgment is Denied and FSELLC's Motion for Summary Judgment must be and is Granted.

It Is So Ordered. The Clerk is directed to enter Judgment against the Plaintiffs in favor of the Fremont Street Experience Limited Liability Company and Coca-Cola Company, Inc. dismissing Plaintiffs' Amended Complaint

and claims therein With Prejudice. The Clerk is further directed to enter this Memorandum Opinion and Order and forward copies to counsel.

IT IS SO ORDERED.

DATED this 18th day of July, 2001.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed July 23, 2002]

DISABLED RIGHTS ACTION COMMITTEE, et al.,	)	No. 01-16657
Plaintiffs-Appellants, v.	)	D.C. No. CV-98-01514-JLQ District of Nevada, Las Vegas
FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, et al.,	)	ORDER
Defendants-Appellees.	)	

Before: HAWKINS, SILVERMAN, Circuit Judges, and RESTANI, Judge.

The memorandum disposition filed May 20, 2002, is withdrawn and is replaced by a memorandum disposition filed contemporaneously with this order.

The panel has voted to deny the petition for panel rehearing, and Judges Hawkins and Silverman have voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.